

CHAPTER TWO

On being illegal

In September 2003, five Britons released their “No One Is Illegal!” manifesto.¹ With the opening salvo, “For a world without borders! No Immigration controls!” they called for the elimination of all border controls, for opposition to all deportations and for a massive trade union campaign to organize undocumented workers. Their opposition to border controls is grounded in a conviction that immigration laws cannot be “reformed” in a way that will meaningfully sever them from what they label racist and fascist origins. The “No One Is Illegal” manifesto asserts the impossibility of grounding thoroughgoing reform in compassionate exceptions to the immigration laws, and the inability of liberalism to do more than reinforce a demarcation between inclusion and exclusion. Beginning in 2002, “No One Is Illegal” groups began to make their voices heard in a number of Canadian cities.² The Canadian groups identify themselves as a “campaign” and, in a perhaps typically Canadian political posture, take a less ideologically articulated position than the British group. The Canadian groups do not, for example, highlight an opposition to all forms of immigration control. They instead focus on a broad integration of social justice issues:

The No One Is Illegal campaign is in full confrontation with Canadian colonial border policies, denouncing and taking action to combat racial profiling of immigrants and refugees, detention and deportation policies, and wage-slave conditions of migrant workers and non-status people.

We struggle for the right of our communities to maintain their livelihoods and resist war, occupation, and displacement, while building alliances and supporting indigenous sisters and brothers also fighting theft of land and displacement.

Similarly named groups have appeared in other European nations over the past few years, including Keim Mensch Ist Illegal in Germany, Ninguna Persona Es Illegal in Spain, Ingen Manniska Ar Illegal in Sweden, Geen Mens Is Illegal in Holland, and

1 Steve Cohen, Harriet Grimsditch, Teresa Hayter et al., “Our Manifesto: No One Is Illegal!” on-line: No One Is Illegal, UK, www.noii.org/no-one-is-illegal-manifesto.

2 In Canada, “No One Is Illegal” is organized city by city in Montreal, Ottawa, Toronto, and Vancouver, and is poised to expand.

Zaden Czlowiek Nie Jest Nielegalny in Poland.³ “No One Is Illegal” campaigns have also had a voice in Australia and the United States. Although the British group traces its origins to campaigns in the 1970s and 1980s, the manifesto and the widespread proliferation of this organizing imperative belong to the twenty-first century.

The emergence of these groups at the opening of this century highlights the fact that public and political discourse has reached a point where “No One Is Illegal” makes sense as a rallying cry. This is a distressing evolution of the English language. In the mid-twentieth century the noun “illegal” was used in reference to Jewish migrants in various places. By the late 1960s, it was used in quotation marks, or as a repeat reference, once illegal immigrants had already been discussed. Now it is used without drawing any special attention at all.⁴ In English, “illegal” has become a noun. This is a key anchor for the book; to examine the law and politics behind the increasingly relevant notion of “illegal” people. It used to be impossible to call people themselves “illegal.” But the fight against this elision has been lost. The emergence of “No One Is Illegal” as a resistance campaign is at once a capitulation and a call to examine the construction of such illegality.

Such examination is the work of this chapter. The first section considers the global phenomenon of illegal migration and its relationship to the increasingly important efforts by Western nations to confront this population flow. The next section interrogates the label “illegal,” considering what it accomplishes analytically and rhetorically. The final section examines the potential of law to confront this “illegality” through considering the attempt made by the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families⁵ to treat both regular and irregular migrant workers as rights-bearing persons.

The globalization of illegal migration

Located just underneath the worldwide panic about illegal migration is an assumption that everyone everywhere is talking about the same thing. News stories rarely bother with precise definitions, but even statistical documentation by state agencies often does not define illegality. In Michael Jandl’s words, “[a]s most estimates do not specify their definition of ‘illegal migrant,’ we have to assume a common-sense approach.”⁶ Jandl believes a commonsense approach is possible but rare. I am not

3 Web sites for the groups are as follows: Kein Mensch Ist Illegal (Germany) <http://www.kmii-tuebingen.de>; Ingen Manniska Ar Illegal (Sweden) <http://www.ingenillegal.org>; Geen Mens Is Illegal (Holland) <http://www.defabel.nl>; Zaden Czlowiek Nie Jest Nielegalny (Poland) <http://www.zcnjn.most.org.pl>. The official web site for Ninguna Persona Es Illegal (Spain) could not be accessed in July 2007 but the group and its goals are discussed at: <http://www.noborder.org/camps/01/esp/display.php?id=8>.

4 *The Oxford English Dictionary*, on-line ed., s.v. “illegal.”

5 *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, GA Res. 45/158, UN GAOR, 45th Sess., Supp. No. 49A, UN Doc. A/45/49 (1990) 261.

6 Michael Jandl, “The Estimation of Illegal Migration in Europe” (2004), 41 *Studi Emigrazione/Migration Studies* 141 at 142.

certain I share Jandl's optimism. The veneer of precision and neutrality embedded in the term "illegal" is an apt guise for assumption and stereotype. What is common in public discourses about illegal migration may not be sensible at all.

Moving toward precision, however, is not easy. By definition, those who are on the move without legal sanction attempt to avoid state surveillance. In general, migration statisticians are interested in "stocks" and "flows," the former referring to ongoing population and the latter to border crossings per year.⁷ Methodologies for estimating the stock of illegal migrants involve extrapolating from census data, making assumptions based on known quantities such as legal migrant populations, surveying those – like employers – who might come in regular contact with illegal migrants, and calculating based on regularization statistics.⁸ Flows of illegal migrants are estimated based on border apprehension statistics as compared to related figures such as asylum claims. While these techniques tend to yield more precise figures, in Jandl's view they are generally less reliable. All of the methods, however, rest on making assumptions that embed an understanding of people and their behaviors in areas where this is notoriously difficult to do and where social scientists are, in any case, just beginning to work at figuring out these factors. Given the myriad difficulties, it is hardly surprising that the British Director of Enforcement and Removals in the Home Office Immigration and Nationality Directorate would state in May 2006 that he had not the "faintest idea" how many people were in Britain illegally.⁹

The most straightforward way to define illegal migration is by reference to the migration law of the state doing the counting. Under this method, anyone who is currently in contravention of the law has an "illegal" status. This will include people who enter the country in breach of the law and those who overstay their permission to remain. More ambiguously, it may include those who intend to make an asylum claim but have not yet made one. Because refugees are not to be punished for extralegal entry, such a claim usually removes one from the illegal entry statistics, but if the claim is rejected the statistical assessment may shift again.

7 Charles B. Keely, "Demography and International Migration" in *Migration Theory: Talking Across Disciplines* (New York and London: Routledge, 2000) 43 at 48:

Migration, therefore, typically refers to change of usual residence that includes crossing a political boundary. Data can count the size of the movement in a given period, the flow, or the cumulative number of migrants, the stock. The stock can be increased or decreased in any period by in and out migration or deaths of previous migrants.

8 Jandl, *supra* note 6, discusses each of these methods along with some variations. See also Jeffrey S. Passel, "The Size and Characteristics of the Unauthorized Migrant Population in the U.S.: Estimates Based on the March 2005 Current Population Survey" (Research Report prepared for the Pew Hispanic Center, March 7, 2006); Franck Düvell, "Irregular Migration: a Global, Historical and Economic Perspective" in Franck Düvell, ed., *Illegal Migration in Europe: Beyond Control?* (New York: Palgrave MacMillan, 2006) 14; John Salt, *Current Trends in International Migration in Europe* (Strasbourg: Council of Europe, 2001); Peter Futo, Michael Jandl, and Liia Karsakova, "A Survey of Illegal Migration and Human Smuggling in Central and Eastern Europe" (2005), 21 *Migration and Ethnic Studies* 35.

9 Alison Little, "Now We Give Up Chasing Illegals; Immigration Chief's Shameful Confession," *The [U.K.] Express* (May 17, 2006) 1; "Illegal Immigration: Removed from Reality," *The [London] Guardian* (May 18, 2006) 36.

In most migration regimes it is possible to have legal permission to remain but restrictions on work rights. This is common with tourist and student visas and with some types of temporary residence permits. Those working in breach of their right to do so may or may not be captured by statistics based on estimates of migration law breaches, even though their contravention is clear. However it is defined, illegality is a creation of the law. Broad shifts in legal regimes make this point more clearly. While Dave Roberts was pilloried in the press for his “faintest idea” comment, there was a rational account available for those who followed this story beyond the sound bite. The most recent Home Office study of numbers had been conducted in 2001. Given the expansion of the European Union in 2004, nationals of ten additional states had some mobility rights in the United Kingdom. The effect of this shift had not been subject to government analysis by May 2006,¹⁰ providing some basis, but not political appeal, for the comment. A similar but more broadly reaching legal shift has occurred with the border changes in the former Soviet Union. The reestablishment of Russian national borders has left Russian citizens stranded and rightless throughout the region. Newly emerging nationalities and rights have created pockets of illegality in many of the new states.

Despite all of this, estimates of illegal population numbers are still compelling. The respected Pew Hispanic Center estimated the “unauthorized” population of the United States at 11.5 to 12 million in March 2006.¹¹ Of this number 7.4 million are Latin American, of which 5.9 million are Mexican. Journalists, some allegedly drawing on Pew Center data, report the illegal population of the United States as ranging from eleven to twelve million.¹² The U.S. government estimates the figure to be seven to twelve million.¹³ The Russian press digest reported in January 2006 that there are up to fourteen million “illegal migrant workers” presently in

10 At the 2004 expansion, the United Kingdom imposed a Worker’s Registration Scheme for nationals of eight of the ten new member states (exempting Cyprus and Malta), further complicating counting in May 2006 when this had just recently been renewed. The Home Office made estimates of the illegal migrant stock available in 2005, but these were derived from applying the “indirect residual method” to 2001 census data.

11 Passel, *supra* note 8 at 3. This estimate draws on the 2005 Current Population Survey, monthly Current Population Surveys up to January 2006, and the 2000 census.

12 The Associated Press estimated the number at twelve million in May 2006 (Brock Vergakis, “Fox: Mexico Wants to be Part of Solution to U.S. Immigration Problem,” *The Associated Press* (May 24, 2006)); The Guardian Weekly’s Suzanne Goldenberg used the figure eleven million (“Bush Orders National Guard to Secure Mexican Border,” *The [London] Guardian* (May 19, 2006)); The Financial Express reported twelve million (“How Many Aliens,” *The Financial Express [of Mumbai]* (May 7, 2006)); *The [London] Financial Times* used the figure 11.5 to 12 million (Edward Alden, “Illegal Immigration in U.S. Grows by 500,000 Annually,” *The [London] Financial Times* (March 8, 2006)). This figure is also used by the *New Zealand Herald* (“Twelve Million Aliens in the U.S.,” (March 9, 2006)).

13 The most recent INS estimate was released in 2003 and estimates the illegal population to be seven million in 2000 (U.S., Immigration and Naturalization Service, *Estimates of the Unauthorized Immigration Population Residing in the United States: 1990–2000* (Office of Policy and Planning, 2003). In 2003 Homeland Security Secretary Tom Ridge estimated the illegal population to be eight to twelve million (Dan Eggen, “Ridge Revives Debate on Immigrant Status,” *The Washington Post* (December 11, 2003) A08.

Russia.¹⁴ International Organization for Migration (IOM) data published in 2005 indicates “up to ten million irregular migrants” in the Eastern Europe and Central Asia region.¹⁵ In 2006, the IOM estimated five to ten million irregular migrants in Russia alone.¹⁶ Novosti reports the Russian Interior Ministry giving figures of between 400,000 and 700,000 for illegal Chinese migrants in Russia’s Far East.¹⁷ The French illegal migrant population has been estimated at between 200,000 and 400,000.¹⁸ The Home Office study based on 2001 numbers, led to an average estimate of 430,000 in the United Kingdom, but other estimates put the number as high as one million.¹⁹ One estimate for Italy puts the illegal population at 150,000.²⁰ In May 2006, reports from Spain estimated that “more than 9,000 Africans” had already reached the Canary Islands in the calendar year, all as illegal migrants.²¹ The IOM gave a total figure of three million illegal residents across Europe for 1998.²² Canada’s extralegal population is estimated at 200,000,²³ and Australia’s is precisely rendered as 47,798.²⁴

Concerns and estimates are not limited to prosperous Western countries. The extralegal population of India has been estimated at fifteen to sixteen million.²⁵ Malaysia reports up to one million illegal “workers” and neighboring Thailand has an illegal population of two million, with another report suggesting one million new illegal entries to Thailand each year.²⁶ Estimates of the illegal population in

14 Kirill Vasilenko “Illegal Immigration on the Rise,” *Vremya Novostey [Russian Press Digest]* (January 27, 2006) 5.

15 International Organization for Migration (IOM), *World Migration 2005: Costs and Benefits of International Migration* (Geneva: International Organization for Migration, 2005) at 154. This region includes Armenia, Azerbaijan, Belarus, Georgia, Kyrgyzstan, Moldova, the Russian Federation, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan. New data not released by December 2007.

16 Natalia Voronina “Outlook on Migration Policy Reform in Russia: Contemporary Challenges and Political Paradoxes,” in Roger Rodríguez Rios, ed., *Migration Perspectives Eastern Europe and Central Asia* (Vienna: International Organization for Migration, 2006) at 71.

17 “Russian Official Alarmed by Illegal Migration from China,” *Novosti [Russian News and Information Agency]* (March 15, 2006).

18 Jon Henley, “France Rejects Migrant Amnesty,” *The [London] Guardian* (May 12, 2005).

19 Little, *supra* note 9; Graeme Wilson, “Million Illegal Immigrants ‘Have Set Up Home in UK,’” *The [London] Daily Mail* (January 12, 2005) 32.

20 “Italian Minister Warns of Sharp Rise in Illegal Migration,” *BBC Worldwide Monitoring* (January 1, 2006).

21 “Zapatero Pledges Controls after 800 Africans Enter Spain,” *Deutsche Presse-Agentur [German Press Agency]* (May 30, 2006).

22 IOM, *supra* note 15 at 78. Although the estimate references 1998, the data were published in 2005, signifying the more cautious approach of this international organization.

23 Nicholas Keung, “Illegals Afraid to See a Doctor,” *The Toronto Star* (May 23, 2006) A04; Thulasi Srikanthan, “Afraid Every Morning I Wake Up,” *The Toronto Star* (May 28, 2006) A04.

24 Australia, Department of Immigration and Multicultural Affairs, *Population Flows: Immigration Aspects, 2004–2005 Edition* (Commonwealth of Australia, 2006) at 142.

25 Sanjoy Hazarika, “North by North East Ticket to Ride but No Law,” *The Statesman [of India]* (April 17, 2006).

26 “Malaysia’s Crackdown on Illegals Is No Solution,” *South China Morning Post* (February 28, 2006) 16; “Malaysia and Thailand to Cooperate in Managing Illegal Workers,” *Deutsche Presse-Agentur [German Press Agency]* (July 29, 2005); “Thailand: Massive Check Up to Take Place to Solve Illegal Immigration Problems,” *Thai Press Reports* (June 21, 2005).

South Africa have ranged from 500,000 to 8 million over the past decade.²⁷ Fiji reported the arrival of “up to 7,000” illegal migrants from China in the two years leading up to October 2005.²⁸ Paraguay has concerns about illegal migrants in its Brazilian population.²⁹ Brazil, the Philippines, and Pakistan have each expressed concern about their nations’ illegal residents elsewhere.³⁰

Although there is clearly a great deal of ambiguity and uncertainty underpinning these numbers, they portray an overall picture of a vast amount of population movement outside legal frameworks. The various estimates may total as many as fifty million people illegally resident somewhere at present. This compares with the aggregated UN estimate of just over 190,634,000 migrants in 2005.³¹ That is, currently about 2.9 percent of the world’s population is living outside its country of birth for a period of at least a year.³² Given this number, illegal migration is an important part of the contemporary story of globalization. In the prosperous Western states that have been tracking these figures for a decade or more, it is perceptibly on the increase.

One factor that accounts for the growth of illegal migration is the law. Since the early 1990s, prosperous Western states have been engaged in a worldwide crack-down on illegal migration. This has included constitutional changes in Germany;³³ a range of restrictions introduced in France by the notorious Pasqua laws;³⁴ extensive reduction of asylum seeker rights in Britain;³⁵ shifts in Italian law;³⁶ moves toward European Union harmonization in matters of illegal migration and asylum

27 Ann Bernstein and Sandy Johnston, “Immigration: Myths and Reality,” *Business Day [of South Africa]* (May 11, 2006) 13.

28 “Fiji Military Briefs Australia on Illegal Migration from China,” *Radio Australia* (October 3, 2005).

29 “Brazil, Paraguay to Work on Border Disputes,” *Xinhua General News Service [of Shanghai]* (March 31, 2005).

30 Alan Clendenning, “Brazilian Police Launch Crackdown on Illegal Immigration to U.S.” *The Associated Press* (September 14, 2005); Nikko Dizon, “Come Home Now ‘Na,’ DFA Tells Filipino Illegals in U.S.,” *Philippine Daily Inquirer* (April 1, 2006) 1; “Steps Being Taken to Check Illegal Immigration Kasuri,” *Pakistan Press International Information Services Limited* (December 27, 2005).

31 United Nations, *International Migration 2006* (United Nations Publication, 2006), on-line: Department of Economic and Social Affairs: Population Division, <http://www.un.org/esa/population/publications/2006Migration.Chart/Migration2006.pdf>.

32 IOM, *supra* note 15 at 13. See also Demetrios G. Papademetriou, “The Global Struggle with Illegal Migration: No End in Sight,” (September 1, 2005), on-line: Migration Policy Institute, <http://www.migrationinformation.org/feature/display.cfm?ID=336>.

33 In 1993, Germany changed the form of its constitutional right to seek asylum. See Terrence Petty, “Germany Closes Borders to Asylum-Seekers, ‘European Fortress’ Feared,” *The Associated Press* (June 30, 1993); Ariane Genillard, “German Court’s Ruling Allays Asylum Law Fears,” *Financial Times [of London]* (July 20, 1993) p. 2.

34 So named after Interior Minister Charles Pasqua, who introduced these laws; see Susan Soltesz, “Implications of the Conseil Constitutionnel’s Immigration and Asylum Decision of August 1993,” (1995), 18:1 *Boston College International and Comparative Law Review* 265.

35 This has been accomplished through a series of amendments beginning in 1999. The most recent restrictions in state support are reflected in section 55 of the *Nationality, Immigration and Asylum Act 2002* (UK), 2002, c. 41.

36 A new Immigration Act was introduced in 2002 (“Bossi-Fini” Law, no. 189 of July 30, 2002, amendment to legislation on immigration and asylum).

admission.³⁷ Canada has introduced stricter penalties for migration infringements and has lowered thresholds for deporting permanent residents.³⁸ The United States has increased border and inland scrutiny.³⁹ Most innovatively, Australia has moved to excise whole tracts of territory from its “migration zone,” rendering parts of the state “nonterritory” for the purposes of claiming asylum.⁴⁰ These are not the only changes of the past fifteen years, but they give a sense of the geographic breadth and range of legal options deployed. Each extension of the law regulating migration increases illegal migration through defining increasingly larger categories as being outside the law. In addition, states have stepped up migration enforcement. This too increases the number of illegal migrants through technologies of surveillance. Just as the physicist calibrates her instrument differently to find a wave or a particle, state migration agencies will find illegal migration when they set out to look for it. The recent increase of border patrol officer numbers by the United States along its border with Mexico will certainly raise the number of people detected while attempting clandestine crossings.⁴¹

Both these effects mean that the current “crackdown” on extralegal migration cannot help but increase it. It is impossible to “observe” illegal migration in any other way. In the absence of law, there can be no illegal migration. In the absence of state enforcement attempts, illegal migration is no more than the proverbial tree falling silently in the forest. The obvious implication of this is that illegal migration would be significantly reduced by halting all moves to enforce existing laws. It would be completely eliminated by repealing all laws regulating it. Neither of these options is politically possible at present, a topic I address directly in [Chapter 3](#). Both, however, reflect part of the rhetorical stance of the “No One Is Illegal Movement.” Migration law is being used to make people “illegal” and this rhetoric is resonating as never before.

Meanings of illegality

The “illegality” of people is a new discursive turn in contemporary migration talk. People who transgressed migration law were recently referred to as “illegal aliens” or “illegal migrants.” These labels are still current, but so is the simple descriptor “illegal.” People themselves are now “illegal”; states are concerned about “illegals.”

37 These are discussed in detail in [Chapter 8](#).

38 Introduced by the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

39 These changes result principally from changes in discretionary practice rather than legislative change, reflecting the capacity of immigration laws generally to shift rapidly in response to political change.

40 *Migration Amendment Regulations 2005* (No. 6) (Cth.). The Coral Sea Island Territory, Queensland islands north of latitude 21 degrees south, Western Australian islands north of latitude 23 degrees south, and Northern Territory islands north of latitude 16 degrees south are all excised.

41 Peter Baker, “Bush Set to Send Guard to Border; Assignment Would be Temporary; Critics Cite Strain on Troops,” *The Washington Post* (May 15, 2006) A01; David Jackson, “Bush Plan Calls for Thousands of Guard Troops Along Border; Conservatives Maintain Doubts,” *USA Today* (May 16, 2006) 1A.

The lived quality of language means that correctness follows common usage. One of globalization's markers is an ever-faster pace of change on all social, cultural, and economic fronts. This is another example.

This shift in discourses permits several important observations.⁴² Although the term "illegal" is precise in its relationship with the law, it is empty of content. It says even less than other identity markers in the migration hierarchy: resident, visitor, guest worker, or refugee. It circumscribes identity solely in terms of a relationship with law: those who are illegal have broken (our) law. Discourse about illegals gathers together a shred of common meaning, some pejorative connotation, and a fixed idea of The Law. The minimal content of the term "illegal" obscures the identities of those to whom it is affixed. While any number of people may infringe migration laws and regulations, the label adheres better to some than to others. We imagine illegals as poor and brown and destitute. The backpacking tourist who overstays her visa and the businessperson who fails to renew papers on time are not who comes to mind. In Australia in 2005–06 the largest group of "illegals" was visitors who had overstayed their legal welcome, and among these the largest nationality group was American,⁴³ hardly those who occupy our imaginary sweatshops and brothels. These data are not systematically available for other states, but there is no strong reason to expect wide variation.⁴⁴ When we think of the boatloads in southern France, in the Timor Sea, or the Atlantic, of those running the Channel Tunnel or the Sonoma Desert, we imagine lean brown faces, poverty, desperation. Despite persistent evidence that, for example, many fleeing Afghans were educated professionals or that remittances to Fujian province have moved families into China's burgeoning middle class, the image of illegals persists.

The predominance of the term "illegal" also underscores a shift in perception regarding the moral worthiness of these migrants. While previously immigration infringements were not widely regarded as criminal, those who enter and remain without authorization are increasingly perceived as "criminal" in a *mala in se* sense. This identification as transgressor first and migrant second facilitates political and public acceptance of the broad range of crackdown measures currently being

42 This section of the chapter draws on my earlier paper, "Making People Illegal" in Peter Fitzpatrick and Patricia Tuitt, eds., *Critical Beings: Law, Nation, and the Global Subject* (Aldershot: Ashgate Press, 2004).

43 The United States is ranked first on the list of countries with the most overstayers as of June 30, 2006, with approximately 4,800 overstayers, approximately 10 percent of the total. The United Kingdom is second with approximately 3,800 overstayers. Third on the list is the PRC with approximately 3,700 overstayers. Australia, Department of Immigration and Multicultural Affairs, *Population Flows: Immigration Aspects 2005–2006 Edition* (Commonwealth of Australia, 2007) at 79, on-line: Australian Government, Department of Immigration and Citizenship: Publications, Research and Statistics, <http://www.immi.gov.au/media/publications/statistics/popflows2005–6/index.htm>. This information published in January 2007.

44 The universal visa requirement in Australia makes data collection feasible. In countries where visas are not required, they cannot be "overstayed." It would be near impossible to gather data on the number of individuals who outstay permission to remain that is merely stamped in their passport on arrival.

implemented, including stripping these individuals of procedural and substantive rights. The morality of immigration discourses is important to contemporary politics, as well as to efforts to shift those politics. Many citizens of prosperous states experience their right to enter and remain there as a morally imbued entitlement, rather than an accident of birth. Those who seek to enter can therefore be cast as “rorters” seeking to unjustly exploit the system or circumvent the (just) rules that confine them to poorer states with fewer life chances.

The term “illegal” also operates to move migration law’s “us-them” line in response to globalizing forces. Migration laws make national borders meaningful for people, determining who can enter and who must be turned away. Through this process such laws constitute the community of insiders, and also spell out degrees of belonging and entitlement through the hierarchical systems they establish. Globalization brings a range of pressures to national borders, and they are increasingly permeable to flows of money and ideas. Migration laws have long been a key site of national assertions – of power, of identity, of “nationness.” The central argument I am pursuing here is that this site is even more important now that “nationness” is threatened across a range of policy areas. One way to understand the present importance of the term “illegal” is to consider how it reinforces migration law’s exclusionary capability when faced with these threats.

Although it is evident that prosperous states would like to assert complete control over those who cross their borders, it is equally evident that this is not possible. Or, at least, that states (especially democratic capitalist ones) are not willing to undertake the trade-offs (mostly economic) that would be necessary to come anywhere close to achieving this goal. The labeling of part of the population as “illegal” accomplishes this exclusion when the border itself does not. Capturing the moral panic about extralegal migrants and enshrining it in law allows governments control that their borders lack. When a part of the population is labeled “illegal” it is excluded from within. Despite their (sometimes long-term) presence and their contribution to the economy, debate about appropriate participation in the political and social community is all but silenced by the label “illegal.” This is markedly different from the tenor of debate that surrounds the entitlements of long-term guest workers, for example.⁴⁵ The difference is underlined by the arguments that Legomsky musters to urge that restricting the sizable illegal population of the United States is counterproductive: as illegals, they provide labor that Americans will not, receive no state benefits, and abide by the law to avoid deportation.⁴⁶ When the nation is unable to assert its traditional sovereignty by closing its borders, it retains its power to separate “us” from “them” through this labeling, although the exclusion is now diffuse and no longer lines up neatly with the clear bright lines of

45 William R. Brubaker, “Introduction” in William R. Brubaker, ed., *Immigration and the Politics of Citizenship in Europe and North America* (Lanham: University Press of America, 1989) 1.

46 Stephen Legomsky, “Employer Sanctions: Past and Future” in Peter Duignan and Lewis H. Gann, eds., *The Debate in the United States Over Immigration* (Stanford, Calif.: Hoover Institution Press, 1998).

a map. Those excluded are outside The Law, regardless of which nation they enter or attempt to enter.

The desperation of the illegal other appears in contrast to our prosperity as a nation. We “have” and they “have not”; entitlement to membership is ours to bestow. One of the shifts occurring at present is that as “illegal” emerges as a globally meaningful identity label, the characteristics of all of those nations against which this other is imagined also tend to merge. The line between having and not having can no longer be easily conceived as fitting around the border of *a* nation and must instead fit around the border of *all* prosperous nations, creating a global understanding of “insiders” and “outsiders.” This conception also resonates with the pedigree of the emotive term nation: prosperous Western nation-states are closer to the ideal of nation than others are. Their desirability as destination for extralegal migrants functions as a measure of their status and standing as nations. While globalization may bring some characteristics of the nation under threat, it also allows the exclusion that is essential to the existence of nations to expand. National actions designed to assert traditional sovereignty also contribute to a globalizing of sovereignty in this new way. Typically, the content of migration law – especially the most important parts for determining who will be admitted and who will not – is easily and frequently altered. As the label “illegal” has no content aside from being against the law, it accommodates similarly frequent changes. The law and the nation name the other in this way as not-us and not-legal.

Making people illegal reflects an increasingly globally coherent view that there are proper and improper reasons to migrate. The force of sanctions against extralegal migration is often aimed at “mere economic migrants.” Being destitute, or even being poor or “average” and wanting a better life in return for abandoning all that is familiar and starting one’s life over again, are insufficient reasons to migrate today. Those who are “merely” seeking a better life are the prime targets of the constricting global migration net. This is a key marker of migration regimes in the twenty-first century. The massive population movements of the nineteenth and twentieth centuries were made up in significant part of people seeking to better their life circumstances. Being poor and willing to start one’s life again was formerly a primary reason to migrate, not to be excluded from doing so. People with an abundance of education, training, labor, and entrepreneurial experience are welcome and encouraged to migrate. Globalization has in this sense reframed traditional “class” lines. Although the basic contours of privilege remain, shifts are visible along the edges. Workers in the emerging IT industry servicing globalization’s technology increasingly enjoy worldwide mobility despite comparatively low levels of education and no connections to traditional wealth. Knowledge workers such as academics are included in the global elite despite often being paid little enough that they may never own their own homes. It is common in both groups to develop career patterns that span the globe.

In addition to asserting sovereignty, this newest round of regulation against illegal migrants is also part of a new facet of the migration law – nation relationship. The

moral panic over illegal migration and the legal responses to it are not limited to one nation. Globalization gives both factors the appearance of happening all over the world, all at once. This is not true, of course, but that matters little to the mythologizing of globalization. It is equally not true that McDonald's restaurants exist the world over or that everyone can access the Internet—globalization is marked by uneven penetration.⁴⁷ The impression that the problem of illegal migration is a global one, and the fact that those who seek to migrate outside the law have access to a geographically broader range of options than in earlier eras, contribute to the construction of an identity category of people named by the new noun “illegal.” We create in this way the impression that the people who seek entry to Australia via Indonesia by boat are *the same as* those who attempt to walk the length of the Channel Tunnel or swim the Rio Grande. This allows talk of “illegals” in international and intranational discourses as though the term had some fixed meaning besides being an adjectival description of legal transgression.

The emergence of “the illegal” as a subject and object of migration law thus reflects features of the crackdown currently being pursued by prosperous Western states. The term, however, has moved well beyond its legal moorings. “Illegal” is now established as an identity of its own, homogenizing and obscuring the functioning of the law and replicating layers of disadvantage and exclusion. Even as it is difficult to accurately track numbers of extralegal migrants, the discursive phenomenon magnifies this difficulty and makes accurate social and political understandings of this migration near to impossible. For extralegal migrants seeking legal protection or redress for harms, the status of “illegal” has been almost insurmountable. This will eventually prove to be one of the most important tests of the global spread of human rights.

Countering illegality with the law

Living without legal migration status is precarious. Illegal migrant workers do not command minimum wage, have no social welfare protections, generally do not have health care or disability insurance, and lack job security. Of the potentially fifty million illegal migrants today, a considerable portion move to work. The work they do is often in the “three D” categories: dirty, dangerous, or degrading. It is now accepted that illegal migrant labor is an important support to prosperous economies because these workers are available on no notice and will simply “disappear” when the need for them passes. It is commonplace to argue that one of the great strengths of the massive American economy depends to a large extent on the perpetual availability of cheap, dispensable, illegal labor. Similarly, urban myth now has it that if all the illegal workers were rounded up and deported, London would

47 William Twining writes compellingly of this unevenness in “The Province of Jurisprudence Re-Examined” in Catherine Dauvergne, ed., *Jurisprudence for an Interconnected Globe* (Aldershot: Ashgate Press, 2002) 13 at 24–25.

stop functioning overnight. While some illegal migrants are literally enslaved, the majority simply inhabit the margins of prosperous societies, invisible because of their illegality to the surveillance mechanisms of contemporary states.

In economic terms illegal migrants are not people but labor, an input for which demand waxes and wanes. Shifts in the globalizing economy have changed the parameters of work, facilitating demand for extralegal workers.⁴⁸ An increasing number of jobs are part-time or seasonal; work is increasingly “outsourced.”⁴⁹ Each of these changes makes workers with no ties to the economy and no formal rights a more useful commodity. A good example of this trend is the importance of “just in time” delivery for supermarkets. Consumers in prosperous Western states have become accustomed to the perpetual availability of fresh fruits and vegetables. In the United Kingdom, the 2004 tragedy of the Morcambe Bay cockle pickers brought public attention to the role of illegal migrants in keeping supermarkets in business.⁵⁰ The British supermarket sector is now able to respond to fluctuations in demand that occur, for example, when the weather warms and more people decide they would like to eat lettuce as a result. On short notice, supermarkets order more lettuces. Gangmasters – the name a descriptor of their work – facilitate the instant delivery of more produce by coordinating workers willing to pick and work in pack houses for long hours on short notice and to find themselves without work the next day.⁵¹

Saskia Sassen has written that the most important distinction in the contemporary era is the one between those with legal migration status and those without it.⁵² This is the result of a spread of human rights norms, in tandem with legal recognition in domestic courts, which combine to reduce the importance of citizenship as a determinant of life chances. David Jacobson makes a similar argument, asserting that human rights norms have overtaken citizenship status as the basic common denominator of human entitlement.⁵³ In Chapter 7, I set out the argument for

48 Saskia Sassen describes these transformations and others in *Globalization and its Discontents* (New York: New York Press, 1998).

49 Outsourcing has both domestic and international dimensions. In some cases, outsourced work moves from the factory to the home, such as piecework in the garment industry. In other cases, outsourced work crosses national borders, as is typical of the growing importance of India to northern IT interests.

50 On February 5, 2004, twenty-one illegal migrant workers drowned while picking cockles, a delicacy that must be consumed fresh, in Morcambe Bay, Lancashire. Although the Bay was notoriously dangerous, it appeared that no effort was made to warn those who were working there under supervision of a gangmaster. The public outcry following this mass drowning contributed to the passage of the *Gangmaster Licensing Act 2004* (UK), 2004, c. 11.

51 Rachael Levene, *Irregular Migrant Workers in the UK: A Story of Marginalization* (LL.M. Thesis, University of British Columbia Law School, 2005) [unpublished]; U.K., H.C., Environment, Food and Rural Affairs Committee, *Gangmasters, Fourteenth Report of Session 2002–2003* (London: The Stationary Office Limited, 2003); U.K., Select Committee on Environment, Food and Rural Affairs, *Memorandum Submitted by the Transport and General Workers Union* (2004).

52 Saskia Sassen, *Losing Control? Sovereignty in an Age of Globalization* (New York: Columbia University Press, 1996).

53 David Jacobson, *Rights Across Borders: Immigration and the Decline of Citizenship* (Baltimore: John Hopkins University Press, 1996); David Jacobson, “Courts Across Borders: The Implications of Judicial Agency for Human Rights and Democracy,” (2003), 25 *Human Rights Quarterly* 74.

tempering this view of citizenship. Nevertheless, I am in full agreement with Sassen that the gulf between those with some kind of migration status and those without it is vitally important. This is because the capacity of the law to span this gulf is sharply limited. Considering the limits of the law in this regard is crucial to unearthing the place of law in accounts of globalization, and to understanding both how and why globalizing forces are making people illegal.

The proliferation of human rights norms is an important marker of the contemporary era of globalization. From the rapid development of rights statements following the Second World War, to the more recent widespread attention to genocide and torture, human rights norms have become common currency. Mechanisms for human rights enforcement have also proliferated. The European Court of Human Rights has gained importance within its jurisdiction and influence beyond. Constitutional reform in South Africa, Canada, and emerging post-Soviet states has given prominence to human rights commitments at a national level. Key to Sassen and Jacobson's arguments is the persuasive evidence that domestic courts extend human rights protections to immigrants and nationals equally. Indeed, this trend is the key to Joppke's thesis that liberal states have lost control over immigration policy, because of liberal courts' interference with such on a human rights basis.⁵⁴

Despite all of this, human rights norms have done little to assist illegal migrants. This is true for two reasons: ironically, because of law's power and its impuissance. The power of the law is implicated in the failure of human rights norms to reach those who are most marginalized because of the tyranny of jurisdiction. Despite the "human" in human rights, being merely human is not enough to ensure legal standing in many instances. Only a handful of individuals have ever used the complaints procedures available in broad international human rights documents such as the International Covenant on Civil and Political Rights⁵⁵ and the Convention on the Elimination of All Forms of Discrimination Against Women,⁵⁶ even for those few states that have accepted the optional obligation for individual complaints. A number of legal doctrines have developed that limit access of illegal people to the courts, such as the common law rule that an employment contract will not be binding contractually when the worker is "illegal" to begin with,⁵⁷ or the conspicuous

54 Christian Joppke, "Why Liberal States Accept Unwanted Immigration" (1998), 50 *World Politics* 266 at 267; Christian Joppke, "Immigration Challenges the Nation State" in Christian Joppke, ed., *Challenge to the Nation State: Immigration in Western Europe and the United States* (New York: Oxford University Press, 1998) 5. Interestingly, Joppke seems to separate courts from "states" in this regard.

55 *International Covenant on Civil and Political Rights*, December 19, 1966, 999 U.N.T.S. 171; 6 I.L.M. 368 (entered into force March 23, 1976).

56 *Convention on the Elimination of All Forms of Discrimination Against Women*, December 18, 1979, 1249 U.N.T.S. 13 (entered into force September 3, 1981).

57 The doctrine of illegality will usually render a contract, such as an employment contract, unenforceable. This is an important feature of the USSC decision in *Hoffman Plastic Compounds v. National Labor Relations Board* 535 U.S. 137 (2002). This doctrine has been deployed routinely to the detriment of migrant workers in the United Kingdom. See, for example, *Sharma v. Hindu Temple and Others* (1990) EAT/253/90.

absence in the Refugee Convention of any explicit right to enter another country.⁵⁸ These doctrines mean that even when people without status find the resources to engage with rights seeking legal processes and overcome the fear of reprisal that publicly approaching the courts entails, they will often be unsuccessful. Law's incapacity, on the other hand, means that securing a rights entitlement before the courts will not necessarily translate into a meaningful change of circumstances. This is a commonplace of rights discourse. Rights talk in the absence of other forms of privilege is often just that: talk.

For these reasons, despite the fact that "human" rights – of which a dizzying array have now been propagated – seem by definition to apply to "humans," advocates for migrants at the margins have worked to establish special rights that apply only to them. The Refugee Convention is the first example of this phenomenon, and I consider its evolving relationship with human rights law as the principal subject of Chapter 4. The Refugee Convention does provide a type of remedy for illegality for those who seek and later obtain refugee status, but the number of people who benefit from this provision is a tiny fraction of those considered illegal migrants.⁵⁹ At this point, I want to consider briefly the short history of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families [Migrant Workers' Convention].⁶⁰ The existence of this Convention attests to the inability of "human" rights to adequately extend to all "humans." Even more revealing, however, is the steadfast attempt in this treaty to protect the rights of even those migrant workers who have no legal migration status. The result of this attempt is a text that demonstrates precisely how few rights these workers have, and how narrowly their entitlement to "human" rights has been read. The document in the end accords a greater place to sovereignty than to the rights of illegal migrants, and as such, is a paragon of the inabilities of law to address the new illegality of people. To examine this inability, I will first spell out my contentions about this Convention.

The Migrant Workers' Convention came into force on July 1, 2003, twelve and a half years after it was opened for signature, accession, and ratification. At that time, twenty-two countries had ratified it.⁶¹ As of December 2007, the number of states party had climbed to thirty-seven, with an additional fifteen signatories. In

58 *Convention Relating to the Status of Refugees*, July 28, 1951, 189 U.N.T.S. 150, (entered into force April 22, 1954) [*Refugee Convention*].

59 In 2006, there were 303,430 asylum claims lodged in the 50 countries that the UNHCR considers to be "industrialized." This number has steadily declined from 628,660 in 2002. UNHCR, Field Information and Coordination Support Section, Division of Operational Services, *Asylum Levels and Trends in Industrialized Countries, 2006: Overview of Asylum Applications Lodged in European and Non-European Industrialized Countries in 2006* (Geneva: UNHCR, 2007) at 10, on-line: UNHCR – The UN Refugee Agency: Statistics, <http://www.unhcr.org/statistics/STATISTICS/460150272.pdf>. Even the 2002 figure is only 1.2 percent of an estimated 50 million illegal migrants, and not all those who lodge asylum claims eventually benefit from the protections of the Refugee Convention.

60 *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, *supra* note 5.

61 Twenty ratifications were required to bring the Convention into force (Article 87(1)).

addition to the length of time required to meet the comparatively low requisite number of ratifications, it is notable that the states party to this Convention are comprised entirely of countries who primarily send rather than receive migrants, with Chile, Mexico, Guatemala, and Turkey among the wealthiest states party.⁶² All the states party are in the lowest two-thirds of countries according to 2006 statistics for GDP per capita.⁶³ The Convention does direct some provisions to obligations of sending states, such as an obligation to readmit nationals (Article 8), a right to vote and to be elected at home for those who are working elsewhere (Article 41, only for workers in a “regular” situation), and an obligation to provide appropriate information to potential migrants (Article 65). Furthermore, sending states are covered by the Convention because it explicitly addresses the entire migration trajectory from preparation to return (Article 1).⁶⁴ Obviously, however, the majority of the provisions are aimed at receiving states, referred to as employment states in the Convention. The absence of major receiving states as signatories underlies the present weakness of the Convention. This is further emphasized by considering the Convention’s contents.

The articles defining the Convention’s scope are cast in apparently broad language, opening with references to “all migrant workers . . . without distinction” and the “entire migration process” (Article 1). A migrant worker “. . . refers to a person who is to be engaged, is engaged, or has been engaged in a remunerated activity in a State of which he or she is not a national” (Article 2 (1)). In addition to the long migration trajectory, Article 1 also specifies that the Convention applies to “. . . all migrant workers and members of their families without distinction of any kind such as sex, race, color, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status” (Article 1(1)). What is omitted here is crucial. Among the enumerated grounds of the nondiscrimination provision, migration status, or even more specifically, irregular or nondocumented migration status is a conspicuous absence. This may yet be read into the “other status” category, but given the specific attention elsewhere in the Convention to lack of status it may also plausibly be argued that this omission was deliberate and ought to be read as an exclusion. Similarly, the definition of migrant worker does not include those seeking work. Possibly work seekers might be covered by the reference to “a person who is to be engaged . . . in a remunerated activity”; however, this interpretive

62 Parties to the Convention include: Albania, Algeria, Argentina, Azerbaijan, Belize, Bolivia, Bosnia and Herzegovina, Burkina Faso, Cape Verde, Chile, Colombia, Ecuador, Egypt, El Salvador, Ghana, Guatemala, Guinea, Honduras, Kyrgyzstan, Lesotho, Libyan Arab Jamahiriya, Mali, Mauritania, Mexico, Morocco, Nicaragua, Peru, Philippines, Senegal, Seychelles, Sri Lanka, Syrian Arab Republic, Tajikistan, Timor-Leste, Turkey, Uganda, and Uruguay.

63 As reported in August 2007 by Millennium Development Goals Indicators: The Official United Nations site for the MDG Indicators, <http://unstats.un.org/unsd/mdg/default>.

64 See Theresa Lawson, “Sending Countries and the Rights of Women Migrant Workers: The Case of Guatemala” (2005), 18 *Harvard Human Rights Journal* 225 for an interesting analysis of the potential reach of obligations of sending states.

extension could only be made after that fact. That is, someone actively seeking work could not be protected by the Convention, although they might possibly, after finding work, be able to complain of their treatment along the way to attaining their position (if their state of employment had signed up to the individual complaints procedure⁶⁵). The Convention does not contain a right to cross borders to work.⁶⁶ Each of these limitations constrains the Convention in its potential application to the most vulnerable migrants.

Most important, however, the scope of the Convention is defined by work itself. A specific rights document aimed at migrant workers and their families excludes those who might migrate for other reasons, in addition to those who would migrate in the hope of finding work but who may not do so. Refugees and stateless persons are explicitly excluded from the protections of this Convention (Article 3). This has several effects, all tied to the hegemony of economic discourses and rationales. In the first place, defining rights in this way subtly fosters a view that there are no other reasons to move. Legitimate human choices and motivations are reduced to this singular one. This is particularly important when we consider those for whom this Convention might possibly, at some distant future time, make a difference. For prosperous, sought-after, globetrotting migrants, the rights set out in this Convention go without saying. One would be hard pressed to find anywhere in the world an investment banker, software engineer, or law professor who would migrate without a prospect of freedom of speech and association or rights to consular services – the types of things set out here. Similarly, migration of the privileged may have some financial angle, but is rarely solely about the money. Those who are literally citizens of the world take into account conditions of life and work, family ties, where their children will be educated, retirement, cultural affinities, tax advantages, and countless other small and large factors. The assumption that decisions are not so complex for those without privilege is misleading.

Reducing migration to economic factors alone functions to reduce our capacity to think fully about the life experiences of those who are differently situated from us. This is one of the “othering” mechanisms that serve to facilitate migration law’s distinction between “us” and “them.” The economic focus of this discourse also marks the Convention as belonging to the contemporary era of globalization. Whatever other factors we use to define and interpret globalizing forces, economic

65 Article 77 provides that States Party may declare that individuals under their jurisdiction may submit complaints to the oversight Committee of the Convention. The procedure will not enter into force until ten states have made declarations of acceptance. To date, no countries have joined in this procedure (*The International Convention of Migrant Workers and its Committee: Fact Sheet Number 24 (Rev. 1)*, Office of the United Nations High Commissioner for Human Rights (2005) at 12).

66 International law contains no border crossing rights, save that which can be read from the obligation of states to admit their own nationals. This is also important to the *Convention Relating to the Status of Refugees*, July 28, 1951, 189 U.N.T.S. 150 (entered into force April 22, 1954), discussed in [Chapter 4](#).

functions are at the core of any understanding of the rapid changes of the past two decades. The trend toward making people illegal is linked to understanding people increasingly as labor, as ingredients in an economic process. The underlying rationale of human rights commitments goes against this trend, but any assessment of the Migrant Workers' Convention demonstrates the significant hurdles involved in attempting to counter economic hegemony.

The Convention explicitly includes both legal migrant workers and those it defines as "nondocumented" or "in an irregular situation" because they are not "... authorized to enter, to stay and to engage in a remunerated activity in the State of employment..." (Article 5). Part III of the Convention sets out rights for all migrant workers and Part IV addresses rights for those who are in a "regular situation." The key difference between these sets of provisions is that the Part III rights are almost exclusively reiterations of commitments set out in other, generally applicable, human rights documents. These include a right to enter and remain in one's state of origin (Article 8), right to life (Article 9), freedom from torture (Article 10), freedom from slavery (Article 11), freedom of thought and religion (Article 12). Some of the rights are expressed more explicitly than they are in other more generally applicable documents. For example, the Article 17 rights to security and liberty include specific remarks about immigration detention and costs of detention, and the trial rights discussed in Article 19 make specific reference to nonretroactivity of criminal law and taking migration status into account in sentencing. The only provisions here that are related specifically to migration status include a prohibition on unauthorized destruction of identity and travel documents and a protection against collective expulsion (Articles 21 and 22). While these provisions are specifically related to migration status, they could possibly be read into early rights documents as a matter of interpretation. The Migrant Workers' Convention does not offer illegal migrant workers much that is not already supposedly available to them. From this we can draw two conclusions. Either the Convention was never intended to extend new rights to those without legal status, or the rights protections generally available to all "humans" are inadequately available to extralegal workers without this additional reinforcement, as are the myriad of rights available to all "workers" set out in the plethora of international labor conventions. (Sadly, the drafters found it necessary to include in this Convention the right to "recognition everywhere as a person before the law" (Article 24).) Both these conclusions may be true. The drafters averted to the particular concerns of illegal migrant workers as evidenced by the Preamble, but these concerns were not reflected in the substantive text of the Convention.⁶⁷ I do agree with Saskia Sassen that this is "one of the most important documents seeking

67 The Preamble contains the following statements:

Bearing in mind that the human problems involved in migration are even more serious in the case of irregular migration and convinced therefore that appropriate action should be encouraged in

to protect the rights of migrants.”⁶⁸ But even if the Convention were universally ratified, her conclusion must be read with deep irony.

The Convention does offer an array of distinct rights for authorized migrant workers. Their rights of liberty of movement and freedom of association can only be restricted by concerns related to national security and public order (Articles 39 and 40). Migrant workers are guaranteed treatment equal to nationals in health and social services provided by the state (Article 43). States are to consider on humanitarian grounds granting equal status to the family members as to workers themselves (Article 44), and similarly to consider granting families the right to remain even after the death of a worker or a marriage breakdown (Article 50). Migrant workers have a right to transfer savings (Article 47) and protection from inequitable taxation and other deductions from income (Article 48). Restrictions on free choice of employment must be specified in legislation (Article 52). A number of other important rights are also spelled out. This is, therefore, a significant rights document for legal migrant workers, aiming to address specific vulnerabilities related to work outside one’s home state. This important achievement also means that the Convention serves to broaden the gap between legal and illegal migrant workers. This raises the perpetual question of the potential that rights documents carry for social transformation, otherwise known as the question of whether law does any good whatsoever. In this case, however, the question is moot for at least the time being as those states most affected by the obligations of the Migrant Workers’ Convention are not bound by it.

The Migrant Workers’ Convention also importantly affirms state sovereignty and validates migration controls. Article 68 reads in full:

1. States Parties, including States of transit, shall collaborate with a view to preventing and eliminating illegal or clandestine movements and employment of migrant workers in an irregular situation. The measures to be taken to this end within the jurisdiction of each State concerned shall include:
 - (a) Appropriate measures against the dissemination of misleading information relating to emigration and immigration;

order to prevent and eliminate clandestine movements and trafficking in migrant workers, while at the same time assuring the protection of their fundamental human rights,

Considering that workers who are nondocumented or in an irregular situation are frequently employed under less favorable conditions of work than other workers and that certain employers find this an inducement to seek such labor in order to reap the benefits of unfair competition,

Considering also that recourse to the employment of migrant workers who are in an irregular situation will be discouraged if the fundamental human rights of all migrant workers are more widely recognized and, moreover, that granting certain additional rights to migrant workers and members of their families in a regular situation will encourage all migrants and employers to respect and comply with the laws and procedures established by the States concerned . . .

68 *Supra* note 52 at 94.

- (b) Measures to detect and eradicate illegal or clandestine movements of migrant workers and members of their families and to impose effective sanctions on persons, groups or entities which organize, operate or assist in organizing or operating such movements;
 - (c) Measures to impose effective sanctions on persons, groups or entities which use violence, threats or intimidation against migrant workers or members of their families in an irregular situation.
2. States of employment shall take all adequate and effective measures to eliminate employment in their territory of migrant workers in an irregular situation, including, whenever appropriate, sanctions on employers of such workers. The rights of migrant workers vis-à-vis their employer arising from employment shall not be impaired by these measures.

These provisions indicate that states that commit to the Convention are also undertaking to implement a variety of crackdown measures, and to collaborate in doing so. Article 69 commits states to taking actions to ensure that irregular situations do not persist. Reference is also made to regularizing status, but this is clearly not the only option. Similarly, the threshold question of whether or not an individual's migration status is irregular is to be determined by domestic law. That is, sovereignty is reinforced by leaving states in firm control of who can be a migrant worker and under which conditions, and by requiring states to reinforce their borders.

Within the text of the Convention, illegality and sovereignty have a reciprocal relationship. Domestic legal attempts to crack down on illegal migration signal an assertion of sovereign power, which is extended within state territory by the label "illegal" itself. Within the text of the Convention, a similar relationship between illegal migration and sovereignty is present. The objective of addressing extralegal migration brings into being a strong positioning of the state. The definition of extralegal migrants depends on domestic law, and the aim of eliminating such migration conjures powerful state actions: "preventing," "eliminating," and "eradicating." In this way, the relationship between sovereignty and illegal migration parallels what happens in domestic law when migrants and potential migrants bring rights arguments to bolster their claims. Once an argument is shifted to the terrain of rights, the right of the nation to shut its borders tends to overshadow rights claims of individuals.⁶⁹ In this instance, any attempt to make a discursive space for illegal migrants is hemmed in by its reference to the sovereign power to make migration illegal.

This points in two directions. The first is toward the difficulties of using law to alleviate illegality. The law is a necessary site for constructing illegality, but is much less apt for remedying it. The contents and current status of the Migrant

⁶⁹ I have explored this argument and its relationship to constitutional rights protections in *Humanitarianism, Identity and Nation: Migration Laws of Australia and Canada* (Toronto and Vancouver: UBC Press, 2005), see especially [Chapter 7](#).

Workers' Convention provide a key illustration of this. In the first instance, it is difficult or impossible for states to agree to any document creating new rights for illegal migrants because even naming such rights requires creating a space for those individuals whom states are exercising considerable resources to erase. Thus even while the Preamble may name the problems, the legal text itself cannot. The true remedy for illegality is an erasure of the law that creates it, not any rights within it that will always in a reciprocal fashion conjure the right of the state to create illegality in the first place. Rather than erasing laws, illegal status is sometimes pardoned through amnesty. This device, as we shall see in [Chapter 7](#), is always framed outside of the law as an exception rather than a challenge. The exclusionary device of making people illegal is so complete that those so labeled scarcely even have human rights. Drawing on Agamben, we can say here that the contemporary trend toward making people illegal counters the modern move toward giving bare life a place in the political sphere. Illegality is exclusion from that sphere, to a status diminished even beyond bare life.⁷⁰

The second direction indicated by the reciprocity of sovereignty and illegality is to search for the source of this intertwining. This, I believe, can be puzzled out by considering how migration law is positioned within the vortex of globalization. It is to this that I turn in [Chapter 3](#). The contemporary crackdown on extralegal migration has changed the central preoccupations of migration law. There is a much greater emphasis in the law on security concerns and exclusions, even though these elements were present throughout migration law's first century. Heightened attention to illegality predates the terrorist assaults of September 11, 2001, and, at any rate, these events are part of the story of globalizing forces, not an isolated pressure on migration laws. The rallying cry "No One Is Illegal" only makes sense in a world where people increasingly *are* made "illegal." The remainder of this book analyzes the modes and mechanisms of this illegality and offers globalization as the explanation for its prevalence.

70 Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. by Daniel Heller-Roazen (Stanford: Stanford University Press, 1995).